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August 10, 2012

Via Overnight Delivery and Electronic Mail

James T. Owens, III
Director, Office of Site Remediation and Restoration
U.S. Environmental Protection Agency, Region I
5 Post Office Square, Suite 100
Boston, MA 02101-3912

**Re: GE-Pittsfield/Housatonic River Site
Dispute Resolution on EPA Cost Bill Under Consent Decree (GER400)**

Dear Mr. Owens:

Enclosed, pursuant to Paragraph 135.b of the Consent Decree for the GE-Pittsfield/Housatonic River Site, is the General Electric Company's (GE's) Reply to EPA's *Statement of Position in Response to GE's July 2, 2012 Statement of Position Regarding Dispute of EPA's FY 2011 Cost Bill*, which is dated July 30, 2012.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'RJM'.

Roderic J. McLaren
Counsel, Pittsfield/Housatonic River Remediation

Enclosure

cc: Robert Cianciarulo, EPA
Dean Tagliaferro, EPA
Timothy Conway, EPA
John Kilborn, EPA
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August 10, 2012

**GENERAL ELECTRIC COMPANY'S REPLY
TO EPA'S JULY 30, 2012 STATEMENT OF POSITION
REGARDING DISPUTE OF EPA'S FY 2011 COST BILL**

General Electric Company (GE) submits this Reply to EPA's July 30, 2012 Statement of Position in Response to GE's July 2, 2012 Statement of Position Regarding Dispute of EPA's FY 2011 Cost Bill (EPA Response). This Reply contains three parts.

Part I shows that EPA's assertion that its position on the issues involved in this dispute is entitled to deference is without merit. Rather, this dispute presents issues of interpretation of the parties' contract embodied in the Consent Decree (CD) and issues of constitutional law – on both of which EPA has no special expertise.

Part II replies to EPA's claim that the vast majority of the billed costs were incurred in preparing documents setting forth its proposed remedy and thus are uncapped "U.S. Future Response Costs." As shown in Part II, and as demonstrated by EPA's own contemporaneous statements, most of the costs for which EPA is seeking recovery were incurred in reviewing GE's Revised Corrective Measures Study (RCMS) Report and the alternatives described in it or in evaluating EPA's own alternatives, which constitutes a "shadow or supplemental study" for the RCMS. These costs are expressly covered by the capped "U.S. Oversight Costs" category.

Part III demonstrates that, to the extent that the billed costs were in fact incurred to prepare remedy proposal documents, they are not recoverable because they were incurred outside the agreed-upon process prescribed in the CD and because charging GE for those costs would conflict with GE's right to meaningful dispute resolution on the RCMS under the CD and the Due Process Clause.

I. EPA's Interpretation Is Not Entitled to Deference.

EPA agrees with GE that this dispute should proceed under Paragraph 137 of the CD, and thus is governed by "applicable principles of law" (CD ¶137.b). However, EPA asserts that a reviewing court should give "deference to EPA's expertise regarding the process for selecting a remedy." EPA Response at 4. According to EPA, the "proper process for selecting a remedy" is a "technical question" that is within EPA's "technical expertise to which courts typically defer." *Id.*

EPA's assertion is a red herring, as the "proper process for selecting a remedy" is not at issue here. Rather, the issues presented in this dispute involve: (1) the proper interpretation and application of provisions of the Consent Decree, a contract among GE, EPA, and others (specifically, the provisions defining the cost categories and those establishing the agreed-upon process for the Corrective Measures Study [CMS] and EPA's remedy selection at this Site); and (2) whether EPA's actions have deprived GE of due process, a constitutional issue. EPA has no special expertise in either of these areas and is therefore not entitled to any deference.

The case law in this regard is well settled. As the Supreme Court has long instructed, consent decrees should be interpreted as contracts. *United States v. Armour & Co.*, 402 U.S. 673 (1971) (“the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it”). Like all contracts, interpretations of consent decrees present questions of law that are reviewed *de novo*, *Ricci v. Patrick*, 544 F.3d 8, 17 (1st Cir. 2008), and an agency’s interpretation of a contractual term included in a consent decree is not afforded any special deference. *Quinn v. City of Boston*, 325 F.3d 18, 34 (1st Cir. 2003) (“A federal appellate court owes no deference to an agency when endeavoring to discern the meaning and constitutional limits of such a [consent] decree”); *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 605 (1st Cir. 1991) (Breyer, J.) (“neither the language nor the reasoning of those [*Chevron* deference] cases suggests that they require similar deference to the agency’s interpretation of a contract that it makes with an outside party”); *see also Southern California Edison Co. v. U.S.*, 226 F.3d 1349, 1537 (Fed. Cir. 2000) (agency is not entitled to deference as it may offer “self-serving, post-hoc reinterpretations of contract” during breach of contract litigation).¹

There is no reason to vary from this well-established doctrine. EPA tries to reframe the issues by asserting that this dispute is about what the “proper process” should be for choosing a remedy, and urges that it has special expertise in that regard. That is groundless misdirection, since the question whether the process that EPA has followed was proper in the abstract is not at issue. This dispute concerns what the CD for this Site requires – whether EPA has placed its costs in the right categories as defined in the CD and whether EPA has followed the process required by the CD before incurring those costs. Those are questions involving the meaning of the parties’ contract, on which a reviewing court would owe no deference to the interpretation offered by one party over another.

This dispute also raises the issue of whether EPA has deprived GE of its rights under the Due Process Clause by developing a proposed remedy and charging GE for the costs of that action before GE has an opportunity for a hearing on the necessary prior step (EPA’s decision on the RCMS Report).² At a minimum, EPA’s interpretation of the CD to allow such a result should be rejected to avoid that constitutional problem. This issue is to be decided *de novo* by a court without deference to the Agency, as EPA certainly has no “technical expertise” in interpreting the Constitution or determining if its reading of the CD violates due process. *See National Mining Ass’n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (the “canon of constitutional avoidance trumps *Chevron* deference”).

¹ The two cases cited by EPA are not to the contrary. EPA Response at 4. First, each case involves interpretation of EPA’s own regulations, not consent decrees negotiated between two parties. *Environmental Defense Fund v. EPA*, 210 F.3d 396, 399 (interpreting 40 C.F.R. § 261.11); *Chemical Waste Management, Inc. v. EPA*, 869 F.3d 1526, 1539 (D.C. Cir. 1989) (interpreting 40 C.F.R. §§ 261.3(c)(1), 261.3(d)(2)). Further, the regulations addressed actual technical issues for which EPA could claim scientific expertise – the criteria for determining whether specific materials qualified as a hazardous waste. *Environmental Defense Fund*, 210 F.3d at 400; *Chemical Waste Management*, 869 F.3d at 1539-1540. In contrast, EPA has no special expertise in contract interpretation.

² *See W.R. Grace & Co. –Conn. v. U.S. EPA*, 959 F.2d 360 (1st Cir. 1992); *In The Matter of General Electric Company*, RCRA Appeal No. 91-7, 4 E.A.D 615, 641 (April 13, 1993); *In re Allied-Signal Inc.*, RCRA Appeal No. 92-20, 5 E.A.D. 291, 300 (May 16, 1994).

II. Most of EPA's Billed Costs Were U.S. Oversight Costs, Not U.S. Future Response Costs.

EPA's substantive response to GE's position boils down to one argument – that the approximately \$1.24 million in costs that were included in the FY 2011 Cost Bill and that EPA continues to seek from GE were related to EPA's "preparation, development, and review" of a proposed Rest of River remedy and, as such, were properly allocated to the uncapped "U.S. Future Response Costs" category under the CD. EPA Response at 5.³ EPA appears to agree that costs incurred in reviewing GE's RCMS Report and the remedial alternatives described therein, as well as its costs of conducting "shadow or supplemental studies" to the CMS, would not be recoverable as U.S. Future Response Costs. Indeed, the CD is clear that such costs constitute capped U.S. Oversight Costs, which are defined to include all costs incurred in "reviewing proposals, reports, studies and other deliverables submitted by [GE] under the Reissued RCRA Permit" and in "conducting shadow or supplemental studies for the studies to be conducted by [GE] under that Permit" (CD ¶ 4). However, EPA claims that the costs that it seeks were not incurred for such activities. Rather, it asserts that those costs were incurred for preparing a remedy proposal, which it contends are part of U.S. Future Response Costs.

EPA's argument misreads the CD and would erroneously allow EPA to end run around the bargain struck by the parties.⁴

To begin with, EPA's reading of the definition of U.S. Future Response Costs is overly expansive and contrary to the CD with respect to activities relating to the Rest of River. The CD placed Rest of River costs prior to the selection of a remedy into three categories. As noted above, U.S. Oversight Costs cover the costs of reviewing deliverables submitted by GE under the RCRA Permit and conducting "shadow or supplemental studies" for GE's studies under the Permit, as well as costs of "otherwise overseeing [GE's] activities" under the Permit (CD ¶ 4). U.S. Future Rest of River Capped Response Costs cover all costs incurred by EPA "in connection with studying or otherwise investigating the Rest of River and/or all field work to support the preparation, development, and selection of the Rest of River Remedial Action" (*id.*) The CD left uncapped as U.S. Future Response Costs only a limited category of Rest of River costs – namely, those costs incurred by EPA under the CD in "preparing, reviewing, and approving the documents that propose and select the Rest of River Remedial Action" (i.e., the time to prepare the Statement of Basis and the draft and final modifications to the RCRA Permit as provided in CD ¶¶ 22.n & 22.p), and the costs associated with "responding to public comments" on its proposed remedy (CD ¶ 4).

There is a temporal logic to these categories. The first two categories involve EPA's review of GE's submittals (which include evaluation of the remedial alternatives) and EPA's

³ In its Response, EPA has agreed that \$393,192 of the costs included in its original bill should not be allocated to the U.S. Future Response Costs category.

⁴ On August 6, 2012, as GE was preparing this Reply, EPA placed on its website extensive documents, including its submission to the National Remedy Review Board (NRRB), the NRRB's recommendations, and the Region's response to the NRRB. While GE has included a reference to EPA's NRRB submission in this Reply, GE is currently reviewing those documents and reserves the right, in future stages of this dispute resolution proceeding, to make additional arguments (beyond those set forth herein), based on its review of those documents.

own studies and investigations. The third category is the last stage in the process when, having considered all the pertinent studies and evaluations, EPA documents its decision – i.e., preparing, reviewing, and approving the decision documents and the response to comments.

This result is also dictated by the decision-making process set forth in the CD. EPA could have negotiated an agreement under which it would perform the CMS. It did not. Instead, the parties agreed that GE would perform the CMS to evaluate the remedial alternatives, and that EPA's role would be as reviewer – i.e., it would review and approve, conditionally approve, or disapprove the CMS Report – and that based on that evaluation, EPA would select a proposed remedy. There is no provision in the CD for EPA to develop its own remedial alternatives, with one exception: In Paragraph 22.1, EPA reserved the right to conduct studies “to shadow or supplement” GE's studies. However, the parties further agreed that if EPA chose to do so, its costs would be capped as part of U.S. Oversight Costs. The uncapped category was limited to the costs of preparing the decision documents – i.e., writing up a remedy proposal and responding to public comments on it.

In this case, the costs that EPA is claiming as U.S. Future Response Costs go far beyond the costs of preparing, reviewing, and approving the Statement of Basis and the draft Permit modification to select a remedy. In a March 2, 2011 presentation to the Citizens Coordinating Council (CCC) (EPA 2011 Update; Exhibit E to GE's July 2, 2012 Statement of Position), EPA could not have been more clear. In a slide captioned “EPA's Evaluation of Alternatives” (p. 3 of presentation), EPA informed the public that “EPA is evaluating the alternatives in the RCMS” based on the “input received from stakeholders” and the “evaluation criteria specified in the RCRA Permit.” EPA also contemporaneously acknowledged its intent during the workshop/Charrette process: “We're evaluating GE's ... alternatives and their detailed analysis and we're performing our own” analysis, and from that EPA would “come up with” its own remedial approach. Transcript of Statements of EPA Personnel at April 7, 2011 Workshop (Transcript; Exhibit C to GE's July 2, 2012 Statement of Position) at 16.

Obviously, by its own words, during this period of time, EPA was still engaged in the evaluative process, rather than documenting a remedy proposal. EPA was evaluating the RCMS alternatives, and it was conducting its own analysis of alternatives (which constitutes a “shadow or supplemental” analysis to GE's RCMS). These activities included not only the situation assessments, workshops, and Charrette, but also the internal peer review process before the National Remedy Review Board (NRRB) and the Contaminated Sediments Technical Advisory Group (CSTAG). EPA's Site Information Package submitted to the NRRB in June 2011⁵ contained a lengthy review and analysis of the RCMS alternatives, which falls squarely within U.S. Oversight Costs. Further, even to the extent that that process focused on a preferred alternative developed by EPA (as EPA asserts), it still constituted an internal evaluation by those EPA groups of a remedial alternative, not the preparation and review of the remedy proposal documents, and thus was a supplemental or shadow evaluation to GE's RCMS evaluations. Indeed, EPA appears to have spent substantial time developing, reviewing, and evaluating its own alternative(s). Under the CD language, such activities could only fall within the performance of shadow or supplemental studies. The parties agreed that the cost of those

⁵ Available at <http://www.epa.gov/region1/ge/thesite/restofriver/reports/487318.pdf>.

activities would be considered U.S. Oversight Costs, which would be capped at a level agreed upon by the parties. Had the parties contemplated that EPA could charge GE for millions of dollars for the Agency's analyses of its own alternatives with no limit, the parties could have and would have provided for it.

In any event, even under EPA's improperly expansive reading of U.S. Future Response Costs as covering anything related to development and review of a preferred alternative, many of the activities for which costs are included in the FY 2011 bill still fall within U.S. Oversight Costs.

For example, we show below, for several key cost categories included in EPA's bill, that those costs do not constitute U.S. Future Response Costs, but fall into U.S. Oversight Costs (or another capped cost category).⁶

Situation Assessments, Workshops, and Charrette. The largest component of costs included in the FY 2011 Cost Bill (\$523,700) was for the "Situation Assessments, Workshops, and the Charrette." Even under EPA's reading of the CD, these are not properly U.S. Future Response Costs. EPA asserts that the primary purpose of the Charrette was "to support EPA's preparation of a remedy" (EPA Response at 8), and "to provide information to the public and obtain its input regarding *a preferred cleanup option*" (id. at 9; emphasis added). To force those costs into U.S. Future Response Costs, EPA now apparently asserts that it had already developed a preferred option and was seeking public input on it, and that thus these activities constituted part of "preparing, reviewing, and approving the documents that propose" the remedy. That characterization is inconsistent with EPA's contemporaneous documents and statements to the public at the time of the workshops and Charrette.

EPA did *not* present "a preferred cleanup option" to the public for its information and input. On the contrary, EPA unquestionably was still gathering information from the public to inform EPA's analysis of the numerous cleanup alternatives. For example, prior to the workshops, EPA's contractors conducted interviews with key stakeholders to understand their views on different alternatives. The workshops and Charrette were for similar purposes. According to EPA, a purpose of the Charrette process was "for the public to interact with EPA regarding their views on the remedial *alternatives*" (EPA 2011 Update at 4; emphasis added) and "to Explore the Pros and Cons of the Proposed *Alternatives*, and for the EPA to Hear the Community's Ideas" (EPA website;⁷ emphasis added). EPA's own April 2011 Information Sheet on EPA's Cleanup Decision Process⁸ described the workshops and Charrette as an "important step *leading up to* EPA's identification of a preferred alternative" (emphasis added). Moreover,

⁶ EPA points out that it already allocated other FY 2011 costs to U.S. Oversight Costs. EPA Response at 5. That is irrelevant to determining whether the costs included in the bill have or have not been assigned to the right category. Similarly, EPA points out that if GE's view is adopted, EPA will not recover these costs, because EPA has already exceeded the cap for U.S. Oversight Costs. *Id.* That too is irrelevant, since whether or not EPA has properly managed its funds and can recover these costs does not determine the correct category under the CD. Indeed, these arguments only further highlight why EPA is not entitled to any deference in this dispute, given its direct economic/budgetary interest in the outcome.

⁷ Available at <http://www.housatonicworkshops.org/workshops.html>.

⁸ Available at <http://www.epa.gov/region1/ge/thesite/restofriver/reports/480399.pdf>.

EPA stated repeatedly during the workshops that it had not made any decision on a preferred alternative, that all options were still on the table, and that it was continuing to evaluate GE's alternatives as well as its own. For example, during the April 7, 2011 workshop, EPA presented a "wide range of cleanup alternatives" equating to "4,194 Available Options" in the RCMS, and noted that all options "are still on the table" EPA presentation on Alternatives and Technologies.⁹ See also the statements made at the workshop by EPA representatives quoted on page 5 of GE's July 2, 2012 Statement of Position, which state repeatedly that EPA had not made any decision as to the appropriate alternative and was still evaluating all options (Transcript at 4, 5, 11, 16).

Likewise, during the May 2011 Charrette, EPA specifically presented to the participants four of the remedial alternatives described in the RCMS Report, which it described as "Representative Options Spanning the Range of Those Evaluated in the Revised Corrective Measures Study" (Housatonic River Public Charrette, Workbook¹⁰); and it asked the participants to evaluate those four alternatives based on the remedy selection criteria in the Permit to assist EPA in its evaluation. This exercise is not consistent with EPA's assertion that it had already selected a preferred alternative and was seeking public input on it.

EPA points to statements from March-April 2011 as indicating that it was "beginning its decision-making process" at the time of the workshops and Charrette. EPA Response at 9.¹¹ However, EPA's argument proves too much, because the "decision-making process" necessarily includes EPA's evaluation of GE's alternatives and the development and evaluation of other alternatives (i.e., shadow or supplemental analyses), which are covered by U.S. Oversight Costs. The fact that those activities are part of the overall decision-making process does not make them part of the preparation, review, and approval of the remedy proposal documents, which is the narrow category that falls within U.S. Future Response Costs.

In sum, by EPA's own contemporaneous description (not its current *post hoc* description), the situation assessments, workshops, and Charrette were part of the evaluative process, namely, EPA's efforts to advise the public and obtain the public's input during EPA's review and development of remedial alternatives. Those activities were not taken to support an already-selected preferred alternative, let alone to write the documents for its proposal. These activities plainly fall within the overall process of evaluating remedial alternatives, as it relates to both EPA's evaluation of the RCMS alternatives and its development and evaluation of its own alternatives. As such, they are U.S. Oversight Costs.¹²

NRRB/CSTAG Process. EPA is currently seeking \$366,930 for the costs of the NRRB/CSTAG process, which include the costs of the Region's preparation for the NRRB review and its presentation to the NRRB, as well as the costs incurred by the NRRB and CSTAG

⁹ Available at <http://www.housatonicworkshops.org/PDFs/handouts/Alternatives%20and%20Technologies.pdf>.

¹⁰ Available at <http://www.housatonicworkshops.org/PDFs/handouts/CharretteWorkbook4MayFinal.pdf0>.

¹¹ If that is now EPA's position, then EPA should remove from the FY 2011 Cost Bill costs incurred before that period.

¹² Alternatively, the costs are part of EPA's ongoing study of the Rest of River and therefore properly allocated to U.S. Future Rest of River Capped Response Costs.

members. EPA has now dropped 10% of the originally billed costs of this work from U.S. Future Response Costs on the asserted ground that a “small portion” of the NRRB/CSTAG time was spent reviewing or discussing the RCMS Report. EPA Response at 8. However, EPA claims that it incurred all of the remaining costs for review and evaluation of the Region’s proposed preferred alternative, which it says are U.S. Future Response Costs. *Id.* These claims are plainly without merit.

First, EPA’s allocation of only 10% of the NRRB/CSTAG-related costs to review of the RCMS alternatives is, on its face, inconsistent with the fact that the Region’s Site Information Package presented to the NRRB in June 2011 (cited above) contained a lengthy description and comparative analysis of the alternatives presented in the RCMS Report (totaling over 100 pages), but devoted only 12 pages to the description and evaluation of EPA’s preferred alternative. Further, to develop a preferred alternative from the RCMS alternatives, EPA, the Corps, and their contractors necessarily had to review and analyze the thousands of pages of text, figures, tables, data, model results, and other analyses in the RCMS Report. This work expressly falls within the plain language of U.S. Oversight Costs, either as part of EPA’s review of the RCMS Report or as part of its own supplemental study. In any event, even accepting EPA’s allocation, the NRRB/CSTAG-related costs to review and evaluate EPA’s preferred remedy still do not constitute costs for “preparing, reviewing, and approving the documents that propose and select” the remedy (i.e., the Statement of Basis and the draft Permit modification). Rather, as discussed above, these activities are part of EPA’s internal review of a particular alternative and as such constitute a shadow or supplemental analysis covered by U.S. Oversight Costs.

U.S. Department of Justice (DOJ) Costs. EPA does not dispute that the DOJ costs included in the bill (\$87,000) were incurred in connection with EPA’s review of alternatives, as EPA has not stated to the contrary despite requests by GE that EPA define what DOJ did with greater particularity. E.g., Letter from S. Boxerman to T. Conway (Feb. 29, 2012) at 9 (Feb. 29 Letter; Exhibit A to GE’s July 2, 2012 Statement of Position). Instead, EPA relies solely on the fact that the definition of “U.S. Future Response Costs” refers to DOJ costs, whereas the other cost categories cover only EPA costs; and therefore EPA claims the DOJ costs could not be “EPA” costs under any other cost category. EPA Response at 6. This argument would mean that if DOJ were performing an activity that falls squarely within one of the capped cost categories (such a reviewing a GE deliverable), its costs would nevertheless not be capped. That is not what the parties agreed upon. The definition of U.S. Oversight Costs (like the other capped cost categories) refers to “all costs” that EPA incurs that fall within the category. In all respects, EPA treats DOJ costs like the costs of any other EPA contractor that EPA pays, and on that basis EPA tacks onto the DOJ charges an additional 32% in *EPA* indirect costs. As such, by its own actions, EPA is treating the DOJ costs as “EPA” costs, and thus those costs can and should be considered U.S. Oversight Costs.¹³

CCC-Related Costs. Of the total of \$27,000 for CCC/Systems Research Applications Corporation (SRAC) costs, EPA is now recommending allocation of 20% of those costs to U.S. Oversight Costs. While this is a welcome step in the right direction, it still does not comply with

¹³ In any event, to the extent that the DOJ costs were incurred for the preparation, review, and approval of remedy proposal documents, they are not recoverable for the reasons given in Part III of this Reply.

the CD.¹⁴ EPA apparently claims that it need not allocate more to that category because these community relations costs are “not included in any of the capped cost categories.” EPA Response at 9. Specifically, EPA asserts that the remaining 80% of these costs “were either costs related to remedy preparation or were ‘costs Incurred to develop plans or reports pursuant to [CD provisions] that do not fall within the [other] categories of costs . . . ’” *Id.* at 10.

It cannot be accepted that CCC time during this period related to remedy preparation when EPA was repeatedly telling the public, including the CCC, that it had not selected a remedy and was still evaluating all remedial alternatives. In any event, “remedy preparation” is not “document preparation,” which is what falls within “U.S. Future Response Costs.” In addition, as noted in GE’s July 2, 2012 Statement of Position and its GE Feb. 29 Letter, a review of the minutes of the CCC meetings indicates that while various topics were covered at those meetings, a significant amount of time was devoted to categories of work covered by U.S. Oversight Costs, such as the Removal Actions outside the River, as well as EPA’s progress in evaluating the RCMS alternatives. For these reasons, most of the costs in this category should be included as “community relations costs” within the U.S. Oversight Costs category (CD ¶ 4). Alternatively, consistent with Paragraph 110.f of the CD, EPA should allocate these costs via its cross-cutting methodology.

ASRC (Records Management) Costs. Of the total of \$67,200 for these EPA contractor costs, EPA is now recommending allocation of 35% to cross-cutting. While this is likewise welcome, it is deficient on a different ground from those discussed above. EPA asserts that the remaining 65% of these records management costs are properly in U.S. Future Response Costs because having complete site files may be useful in some future enforcement action, if one occurs. EPA Response at 10-11. Given that there is no pending or anticipated enforcement action,¹⁵ it is illogical for EPA to assert that EPA has incurred all of these costs “to enforce the Consent Decree.” Further, each of the capped cost categories contemplated that the charges associated with the work conducted in that category, such as “contractor costs,” “data management costs” and similar charges, would be assigned to that category of costs. Again, as articulated in GE’s Feb. 29 Letter, given the diverse range of activities described in EPA’s invoices, the logical place for these kinds of charges is cross cutting, as these are clearly costs that are “incurred in support of tasks included in more than one cost category” (CD ¶100.f).

III. To the Extent EPA’s Costs Were Incurred for Preparing, Developing, and Reviewing the Remedy Proposal Documents, They Were Not Incurred Pursuant to the Consent Decree.

To the extent that the costs in the FY 2011 Bill were in fact incurred for preparation, development, and review of the remedy proposal documents as EPA contends, they are not recoverable because they were incurred outside the sequential process established in the CD. As such, these costs were not “incurred pursuant to the provisions of this Consent Decree” and thus

¹⁴ EPA has offered no explanation for its proposed allocation of these costs – or any of the other allocations made for the first time in EPA’s Response.

¹⁵ This future action would not concern the Rest of River remedy, as EPA asserts that none of these costs concerns the development of the administrative record for that remedy.

are not U.S. Future Response Costs (CD ¶ 4). In addition, charging GE for these costs would violate GE's procedural rights under the CD and as a matter of due process.

A. Costs for Preparing Remedy Proposal Documents Are Not Recoverable Because They Were Incurred Outside the Prescribed CD Process.

EPA argues that there is no specific language in the CD or the RCRA Permit explicitly prohibiting EPA from developing a remedy proposal and preparing the documents setting forth that proposal before acting on the CMS Report. EPA Response at 14. However, Paragraph 22 of the CD provides that “selection of a Remedial Action for the Rest of the River *shall be conducted* in accordance with the Reissued RCRA Permit and the provisions of Paragraph 22 (emphasis added); and the carefully negotiated, agreed-upon approach embodied in those provisions is a sequential approach that requires completion of the CMS process before EPA develops and documents a remedy proposal. To interpret the absence of an explicit prohibition as providing EPA with the unfettered authority to develop a remedy proposal whenever it wants to and to spend whatever it costs to do so would be flatly inconsistent with that agreed-upon approach. It would also allow an end run around the capped cost categories, provisions that were likewise carefully negotiated by the parties.

Paragraph 22 clearly establishes a sequential process in which each step is to be completed before proceeding to the next step, as shown in GE's July 2, 2012 Statement of Position at 4 (listing steps). This expressly extends to the CMS process as well – requiring GE to submit a CMS Proposal to EPA (CD ¶ 22.j), to carry out the CMS in accordance with that Proposal as approved by EPA (CD ¶ 22.k), and to submit a CMS Report to EPA (*id.*), and then providing that EPA will issue a Statement of Basis and draft permit modification only upon “satisfactory completion of the CMS Report in accordance with the Reissued RCRA Permit” (CD ¶ 22.n). In addition, the CD and the RCRA Permit provide GE with the right to invoke dispute resolution to challenge any EPA decision on the CMS (CD ¶ 141.a; RCRA Permit Special Condition II.H).

Thus, under the CD and Permit, the CMS step must be completed, including EPA's action on the CMS Report and any dispute resolution proceeding on that report, before EPA decides upon a proposed remedy and begins to draft the documents setting forth that proposal. For EPA to select and begin documenting a remedy proposal before the evaluation of remedial alternatives is completed would represent a pre-judgment that would undermine the purpose of the CMS – to provide a basis for the proposed remedy selection. The evaluation of remedial alternatives cannot be completed until EPA issues its decision on the CMS Report and GE has an opportunity to dispute it, because the outcome of that dispute resolution proceeding could affect the evaluation and thus the remedy proposal. Indeed, under EPA's theory, EPA could begin working on a remedy proposal at any time during the CMS process, even prior to submission of the CMS Report. That would thwart the objective of the CMS to provide a basis for the remedy proposal and would read out of the CD the specified sequential framework for choosing the remedy.

In its Response, EPA cites to various RCRA and CERCLA guidance documents recommending different approaches and even noting that a CMS may not be required in some

cases. EPA Response at 14-15. However, those references are irrelevant, as they do not change the fact that the parties agreed *in the CD* to the specified sequential process for this Site.¹⁶ Indeed, this sequential approach is consistent with EPA's statements describing the process that it understood it was actually following. See Svirskey 2008 CMS Presentation (Exhibit D to GE's July 2, 2012 Statement of Position) (indicating that EPA will *first* "approve, conditionally approve, or disapprove the CMS) and *then* "develop[] preferred alternative for public comment"); Transcript at p. 4 (Cianciarulo – "[The CMS] document will feed into, really the next major process that we are leading up to here, which is when EPA comes out and proposes a clean-up plan for public comment").

B. Charging GE for Remedy Proposal Documentation Costs Before the CMS Process Is Completed Would Violate GE's Dispute Resolution Rights Under the CD and Due Process Clause.

In addition to the above points, EPA may not recover its costs of developing and documenting a remedy proposal before the CMS process is completed because doing so would conflict with GE's right to review of EPA's decision on the CMS under the CD and the Due Process Clause. The CD and that RCRA Permit are plain that GE must have the ability to dispute EPA's determination either to disapprove or conditionally approve the RCMS Report. As shown in GE's July 2, 2012 Statement of Position, this is a matter of due process of law. *In The Matter of General Electric Company*, RCRA Appeal No. 91-7, 4 E.A.D 615 (April 13, 1993), *citing Mathews v. Eldridge*, 424 U.S. 319 (1976).

EPA does not dispute GE's right to dispute resolution. Instead, it posits that, even if it had already begun work on a remedy proposal, GE will still have the right to dispute resolution on EPA's determination on the RCMS Report once EPA acts on that Report. EPA Response at 16. According to EPA, that ought to be sufficient. In that case, however, the right to a hearing would be undermined by the fact that EPA would have already developed a remedy proposal. GE's right to dispute resolution under the CD and as required by due process is a right to have a *meaningful* opportunity challenge EPA's decision on the CMS. "The fundamental requirement of due process is the opportunity to be heard 'at a *meaningful time and in a meaningful manner*.'" *Mathews v. Eldridge*, 424 US 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (emphasis added). In this case, that means that GE must have the opportunity to challenge EPA's decision on the RCMS Report *before* EPA selects and begins work on a remedy proposal, so that that proposal can take into account the outcome of the dispute resolution. A dispute resolution process that does not include that opportunity would not be meaningful.

¹⁶ In any event, EPA's reference to its CERCLA guidance is misleading. It quotes a sentence from *A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Documents* (1999) at p. 2-1, to the effect that "in some circumstances, a draft [proposed plan] can be developed as the RI/FS is being finalized." EPA Response at 15. That quotation relates to the situation in which the lead agency is doing the RI/FS. The guidance states specifically that "[i]f a PRP prepares the RI/FS, then the Proposed Plan should be drafted by the lead agency *after the lead agency approves the RI/FS*" (p. 2-1; emphases added). The latter sentence is more relevant here, where GE prepared the CMS Report (analogous to the RI/FS).

EPA also asserts that GE has no property interest that would be violated, so long as “EPA is billing GE properly according to the agreed-upon definitions in the Decree.” EPA Response at 16. That curious argument misses the mark. GE has a clear property interest in the money that EPA is demanding that GE pay now based on EPA’s costs. EPA has deprived GE of its property without due process by charging GE for EPA’s development of a remedy proposal *before* GE has had the opportunity for a hearing that is supposed to precede (and potentially influence) the development of such a remedy proposal. The cost definitions in the CD have nothing to do with this issue.

At a minimum, EPA’s interpretation of the CD to allow the Agency to charge GE for the costs of developing a remedy before GE has had the opportunity to dispute EPA’s action on the RCMS Report would raise a serious due process issue. As a result, EPA’s interpretation should be rejected in order to avoid that constitutional problem. *Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”).